

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT NONRULE POLICY DOCUMENT

Title: Supplemental Environmental Project Policy

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Brief Description of Subject Matter: Used in conjunction with IDEM's Civil Penalty Policy to determine if a company may reduce the size of the final cash penalty by undertaking an environmentally beneficial project.

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This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws.

It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy document may be put into effect by IDEM once the revised nonrule policy document is made available for public inspection and copying. IDEM will submit revisions to the Indiana Register for publication.

I. INTRODUCTION

In order to protect and improve the environment in Indiana and serve Indiana citizens, the mission of the IDEM, Office of Enforcement, is to address environmental violations with timely, quality enforcement actions that achieve compliance, result in an improved environment, and deter future violations. One way to improve the environment through enforcement actions is to obtain additional relief in the form of projects which prevent or remediate the adverse public health or environmental consequences of pollution. Such projects may be included in an enforcement settlement in order to use opportunities afforded by the case to improve the environment beyond existing legal requirements. As part of the settlement, the size of the final cash penalty may be reduced by the commitment of the violator to undertake environmentally beneficial expenditures which are not otherwise required by law ("Supplemental Environmental Projects").

In most instances, even when a settlement includes a Supplemental Environmental Project ("SEP"), IDEM may still require the assessment of a cash penalty according to criteria established in IDEM's Civil Penalty Policy. Each administrative settlement in which a SEP is proposed must be approved by the Assistant Commissioner of the Office of Enforcement before the settlement is finalized. It is solely within IDEM's enforcement discretion to approve or deny any SEP and to approve or deny any condition of a SEP.

The six (6) categories of permissible SEPs are pollution prevention, pollution control, environmental restoration, public awareness, environmental audits, and comprehensive environmental training projects. There may be other types of projects that may be acceptable and do not fall in these categories, but this policy is intended as guidance to what is acceptable.

A violator will not be given additional time to correct the violation and return to compliance in exchange for performing a SEP.

II. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The following six (6) categories of projects will be considered as potentially acceptable SEPs, subject to meeting the additional criteria described in succeeding sections.

A. Pollution Prevention Projects

IC-13-11-2-166 is consistent with the federal definition of pollution prevention, and is described in the Indiana Register, Volume 21, Number 4, January 1, 1998, in IDEM Nonrule Policy Document, Identification Number 0003-NPD.

Pollution Prevention means:

1. “Source reduction” as defined under the federal Pollution Prevention Act of 1990, and
2. Other Practices that reduce or eliminate the creation of pollutants through:
 1. increased efficiency in the use of raw materials, energy, water, or
 2. protection of natural resources by conservation.

Source reduction, as defined under the federal Pollution Prevention Act, means any practice which:

1. Reduces the amount of any hazardous substance, pollutant, contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and;
2. Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

The following are the (6) basic approaches to pollution prevention that would be eligible for credit:

1. Equipment or technology modification:

New facility process design for pollution prevention incorporates environmental

objectives with minimal use of toxic materials in the production process using state of the art technology. Redesign options include retrofit upgrading, modernizing, or replacing production unit equipment to reduce the use of toxic materials in the production process.

2. Process or procedure modification:

This pollution prevention approach is usually considered after the process equipment is already in place. Frequently, changes that prevent pollution can also provide production improvements as they reduce the quantity or toxicity of in-process hazardous materials. Process modifications include adjustments to flow rates, temperature, pressure or residence times. Procedure modifications include layout or plumbing changes, in-line filtration, and the use of automation. This is often a continuous method of improvement, and a viable option to incorporate pollution prevention into an already existing process.

3. Reformulation or redesign of products:

Product reformulation or redesign for pollution prevention incorporates environmental objectives with minimal loss to the product's performance, useful life, or functionality. The reformulated product's composition is rendered less toxic or nontoxic to ensure environmental protection and consumer safety for its intended use, reuse, recycling, and ultimate disposal.

4. Substitution of raw materials:

A less toxic or nontoxic input material is substituted for one that is toxic or that causes a waste treatment problem. Raw materials integral to and necessary for the production of a product or the providing of a service are carefully selected to ensure the least degree of toxicity or potential contribution to the creation of environmental pollutants, hazardous substances or contaminants. This approach to pollution prevention reduces or eliminates hazardous materials entering the production process and minimizes waste treatment requirements.

5. Energy and natural resources conservation:

Energy conservation minimizes power plant emissions through design changes to increase energy efficiency or by substituting environmentally benign fuel sources. Such practices reduce environmental damages from the extraction, processing, transport, and combustion of fuels. Natural resource conservation ensures the prudent use of water and mineral aggregates.

6. Environmental Management Systems:

Environmental management systems identify pollution prevention opportunities in order to implement one or more of the above pollution prevention methods.

Improvements in housekeeping, maintenance or inventory control are considered

pollution prevention activities under Indiana's definition but would not be eligible as a SEP because they are considered sound business practices which do not confer substantial, long-term public health and environmental benefits.

B. Pollution Control Projects

A pollution control project is one that reduces pollution at a violator's facility substantially beyond the compliance requirements. Pollution control projects reduce pollutant levels or odors by advanced control technologies, materials reuse and reclamation, but not by dilution or concentration. Pollution control projects should not include reducing pollution by transferring it from one media to another unless beneficial reuse, improved destruction, or some other significant environmental benefit results. Projects that allow for production increases will not qualify as pollution control projects. Also, pollution reduction programs that entail outsourcing industrial processes which contribute pollution to other facilities do not qualify as pollution control SEPs.

A pollution reduction project that is required by law but proposes an accelerated compliance schedule project may qualify as a SEP. For example, assuming there is a statutory or regulatory schedule for pollution phase out or reduction (or it is likely to be proposed in the foreseeable future, e.g., upcoming rulemaking), if a violator proposes to complete a phase out or reduction at least twenty-four (24) months ahead of time, and such a proposal for accelerated compliance can be demonstrated to result in a significant pollution reduction, then the proposal may qualify as a SEP. In addition, if the violator substitutes another substance for the one being phased out, the violator has the burden to prove the new substance is non-polluting or represents a significant pollution reduction over the phased-out pollutant.

C. Environmental Restoration Projects

Environmental restoration projects repair damage to and/or enhance the environment. Environmental restoration projects must go beyond repair or mitigation which the Respondent is required to do by law or court order, and only those funds expended for the portion of the project beyond what is required by law or court order shall receive SEP credit.

D. Public Awareness Projects

These projects are defined as publications, broadcasts, or seminars which underscore for the regulated community the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. Permissible public awareness projects may include sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry.

Public awareness projects directly serve deterrence objectives and contribute indirectly to enforcement efforts. Respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the project was undertaken as part of the

settlement of an enforcement action brought by IDEM. These projects will be closely scrutinized to ensure that they fulfill the legitimate objectives of this policy in all respects.

E. Environmental Audits

Environmental audits which are conducted to identify deficiencies in existing management and/or environmental practices may be considered. In order to qualify as a SEP, the environmental audit must be multi-media, and must be conducted at all facilities in the State of Indiana which are owned by the violator. The proposal must also include a commitment from the violator to follow-up and correct all problems found in the audit. A copy of the environmental audit will be submitted to IDEM and treated as confidential information.

F. Comprehensive Environmental Training

Environmental training projects provide essential information to a violator's employees concerning the employee's and the violator's environmental responsibilities. These projects must provide significant, ongoing, comprehensive environmental management training. To qualify as a SEP, the training must have the following characteristics:

- Go beyond the training requirements found in environmental regulations such as the hazardous waste rules, the water and wastewater treatment operator certification rules, and several air pollution rules;
- Include all employees with environmental responsibilities;
- Be conducted as part of an ongoing offering that includes at least one day a year of training for key environmental personnel and all production management;
- Address all environmental media in an integrated manner;
- Identify the potential environmental and legal implications of the violator's actions or inactions;
- Describe the compliance responsibilities of the violator including a detailed review of the violator's permit requirements; and
- Provide an assessment, such as an examination, of the effectiveness of each training offering and the program as a whole.

Only costs associated with the presentation of the training such as trainer's fees, course materials and reasonable room rental charges may be credited. The cost of the travel and regular salaries (including overtime) for participants is not creditable.

III GENERAL CRITERIA FOR SEPs

A. Status of the Enforcement Action

Any violator against whom IDEM has taken an enforcement action may propose to undertake a SEP at any time prior to resolution of the action, although IDEM will consider both the status of the action and the resources that have been committed to the action before deciding whether to accept a SEP proposal. For example, if settlement of the action has been achieved in concept, including the amount of civil penalties, IDEM may not agree to reopen discussions to consider a SEP. The violator should submit a complete SEP proposal as early as possible in the enforcement process. SEPs proposed more than sixty (60) days following the receipt of a Notice of Violation may not be eligible for consideration.

B. Compliance History

The violator's compliance history must be examined during the evaluation of a SEP proposal. If the violator has a history of violations, the deterrence objectives of an enforcement case may not be served by allowing the violator to undertake a SEP in lieu of a full cash penalty.

C. Technical and Economic Resources

Enforcement personnel must consider whether the violator has the technical and economic resources needed to successfully implement the SEP, and should reject a SEP proposal if the violator does not have the resources. In addition, if the violator claims to be unable to pay the civil penalty, this factor should weigh against the violator's ability to successfully complete a SEP.

D. The Primary Benefit of a Supplemental Environmental Project

The primary benefit of a SEP is to use an enforcement action as an opportunity to improve the environment above and beyond mere compliance. Projects are not intended to reward the violator for undertaking activities which are obviously in its economic self-interest (e.g., update or modernize a plant to become more competitive). Therefore, as a general rule, these projects will not be approved when they represent a "sound business practice", i.e., capital expenditures or management improvements for which the IDEM may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it. In addition, only projects which have not already been undertaken by the violator will be considered eligible. Projects which have been completed, or which have already been committed to by the violator before settlement discussion with IDEM are not eligible.

A possible exception to the prohibition against acceptance of a SEP which represents a "sound business practice" is for a pollution prevention project. Although a pollution prevention project can be viewed as a "sound business practice" since (by definition) it is designed both to make production more efficient and reduce the likelihood of noncompliance, it also has the

advantage of potentially providing significant long-term environmental and health benefits to the public. Therefore, the "sound business practice" limitation will be waived only for pollution prevention projects if IDEM decides, after due consideration and upon a clear demonstration by the violator as to what the public health and/or environmental benefits would be, that those benefits are so substantial that the public interest would be best served by providing additional incentives to undertake the project.

IV EXTENT TO WHICH THE FINAL ASSESSED PENALTY CAN REFLECT A SUPPLEMENTAL ENVIRONMENTAL PROJECT

Although SEPs may directly fulfill IDEM's mission statement, there is an important countervailing enforcement goal that penalties should achieve a sufficient deterrent effect upon the regulated community. Moreover, when a monetary penalty is warranted, IDEM's Civil Penalty Policy requires the assessment of a cash penalty according to certain criteria, generally at a level which captures the violator's economic benefit of noncompliance plus the "base penalty" after adjustment factors, which represents the gravity of the violations (the "gravity penalty"). Generally, a settlement which recovers economic benefit plus twenty percent (20%) of the gravity penalty is acceptable.

Most SEPs will have an offset ratio of at least 2:1, meaning that one dollar (\$1.00) of the civil penalty amount will be offset for every two dollars (\$2.00) expended on the SEP. The decision regarding an appropriate offset is a matter of the judgment of IDEM. In addition, smaller assessed civil penalties (less than \$10,000) will generally not be considered for offset by a SEP.

7. PROJECT SUBMITTAL

In submitting a SEP proposal for consideration by IDEM, the violator must:

1. submit the proposal shortly after the enforcement process begins;
2. describe the project completely, including pertinent technical information;
3. describe which of the six categories of SEPs the project falls under; and
4. demonstrate how the SEP meets the requirements found in this policy.

Failure to submit the SEP as required in this policy could result in IDEM's disapproval of the proposed SEP.

Notwithstanding the specific guidance outlined above, IDEM may approve other SEPs provided it is demonstrated that the proposed project will result in a significant improvement to the environment or significantly enhance the potential to protect human health.